

CHAPTER 4

THE ANTIDEFICIENCY ACT

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CHAPTER 4

THE ANTIDEFICIENCY ACT

I. INTRODUCTION.

II. REFERENCES.

- A. 31 U.S.C. § 1341 (prohibiting obligations or expenditures in excess of appropriations and contracting in advance of an appropriation).
- B. 31 U.S.C. § 1342 (prohibiting government employees from accepting voluntary services).
- C. 31 U.S.C. §§ 1511-1517 (requiring apportionment/administrative subdivision of funds and prohibiting obligations or expenditures in excess of apportionment or administrative subdivision of funds).
- D. 31 U.S.C. § 1344 (prohibiting the unofficial use of passenger carriers).
- E. OMB Circular A-11, Preparation, Submission, and Execution of the Budget (June 2005) [hereinafter OMB Cir. A-11], available at <http://www.whitehouse.gov/omb/circulars>.
- F. DOD Directive 7200.1, Administrative Control of Appropriations (May 1995).
- G. DOD Regulation 7000.14-R, Financial Management Regulation, vol. 14 (March 2001) [hereinafter DOD FMR] available at <http://www.dtic.mil/comptroller/fmr>.
- H. Defense Finance and Accounting Service - Indianapolis Reg. 37-1, Finance and Accounting Policy Implementation (Jan. 2000 w/ changes through Mar. 2005) [hereinafter DFAS-IN 37-1], available at <https://dfas4dod.dfas.mil/centers/dfasin/library/ar37-1/index.htm>.
- I. Air Force Instruction 65-608, Antideficiency Act Violations (18 Mar. 2005) [hereinafter AFI 65-508] available at <http://www.e-publishing.af.mil>.

- J. Defense Finance and Accounting Service - Denver, Interim Guidance on Procedures for Administrative Control of Appropriations and Funds Made Available to the Department of the Air Force (Sep. 1999) [hereinafter AF Procedures for Administrative Control of Appropriations] available at <https://dfas4dod.dfas.mil/library/pubs/7200-1.pdf>.
- K. Department of Navy, NAVSO P-1000, Financial Management Policy Manual (Dec. 2002) [hereinafter DON FMPM], available at <http://www.fmo.navy.mil/policies/regulations.htm>.
- L. Hopkins and Nutt, The Anti-Deficiency Act (Revised Statute 3679) and Funding Federal Contracts: An Analysis, 80 Mil. L. Rev. 51 (1978).

III. THE ANTIDEFICIENCY ACT'S FISCAL CONTROLS.

A. APPROPRIATIONS – THE FIRST LEVEL. 31 U.S.C. § 1341.

- 1. In Excess of. An officer or employee may not make or authorize an obligation or expenditure that exceeds an amount available in an appropriation or fund. 31 U.S.C. § 1341(a)(1)(A). USEC Portsmouth Gaseous Diffusion Plant “Cold Standby” Plan, B-286661, Jan. 19, 2001; Department of Labor-Interagency Agreement Between Employment and Training Admin. and Bureau of Int’l Labor Affairs, B-245541, 71 Comp. Gen. 402 (1992).
 - a. The scope of this statute is broader than that of the apportionment statutes. It includes appropriations not subject to apportionment, e.g., expired appropriations. Matter of Adjustment of Expired and Closed Accounts, B-253623, 73 Comp. Gen. 338 (1994); The Honorable Andy Ireland, House of Representatives, B-245856.7, 71 Comp. Gen. 502 (1992).
 - b. The GAO has opined that this statute prohibits obligations in excess of appropriated or authorized amounts and obligations that violate specific statutory restrictions on obligations or spending. Reconsideration of B-214172, B-214172, 64 Comp. Gen. 282 (1985); Customs Serv. Payment of Overtime Pay in Excess of Limit in Appropriation Act, B-201260, 60 Comp. Gen. 440 (1981).

2. In Advance of. An officer or employee may not involve the government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law. 31 U.S.C. § 1341(a)(1)(B); Propriety of Continuing Payments under Licensing Agreement, B-225039, 66 Comp. Gen. 556 (1987) (20-year agreement violated this provision because the agency had only a one-year appropriation); To the Secretary of the Air Force, B-144641, 42 Comp. Gen. 272 (1962).
3. Sequestered Funds. An officer or employee may not make or authorize an expenditure or obligation, or involve the government in a contract for the payment of money required by law to be sequestered. 31 U.S.C. § 1341(a)(1)(C) and (D). See also OMB Cir. A-11, §§ 20.3 and 20.9.
4. Exceptions. A contracting officer may obligate in excess of, or contract in advance of, an appropriation if authorized by law.
 - a. The statute must specifically authorize entering into a contract in advance of or in excess of an appropriation. The Army Corps of Eng'rs' Continuing Contracts, B-187278, 56 Comp. Gen. 437 (1977); To the Secretary of the Air Force, B-144641, 42 Comp. Gen. 272 (1962).
 - (1) Example: 41 U.S.C. § 11 permits the DOD and the Coast Guard to contract in advance/excess of an appropriation for clothing, subsistence, forage, fuel, quarters, transportation, or medical and hospital supplies but cannot exceed the needs for the current fiscal year (FY). See DOD FMR, vol. 3, ch. 12, para. 1201. Report use of this authority to the next higher level of command. See DOD FMR, vol. 3, ch. 12, para. 120207 (Jan. 2001); DFAS-IN 37-1, ch. 8, para. 0818 (requiring local commanders to forward reports through command channels).
 - (2) The authority conferred by 41 U.S.C. § 11 is “contract” authority, and does not authorize disbursements. See AF Procedures for Administrative Control of Appropriations, § 4, para. E.

- b. Certain statutes authorize the execution of multiyear contracts. See, e.g., 10 U.S.C. §§ 2306b, 2306c, 2829; 41 U.S.C. § 254c. See also FAR 17.104; DFARS 217.170; DLA Multiyear Contract for Storage and Rotation of Sulfadiazine Silver Cream, B-224081, 67 Comp. Gen. 190 (1988) (DLA lacked authority to execute multiyear contract).
 - 5. Contracts Conditioned Upon the Availability of Funds. See FAR 32.703-2; To the Secretary of the Interior, B-140850, 39 Comp. Gen. 340 (1959); To the Postmaster Gen., B-20670, 21 Comp. Gen. 864 (1942).
 - a. Activities may initiate certain contracting actions prior to an appropriation if the solicitation and contract include the clause, FAR 52.232-18, Availability of Funds. See To Charles R. Hartgraves, B-235086, Apr. 24, 1991, 1991 US Comp. Gen. LEXIS 1485 (award without clause violated the ADA).
 - b. The government may not accept supplies or services under these contracts until the contracting officer has given written notice to the contractor that funds are available.
 - 6. Variable Quantity Contracts. Requirements or indefinite quantity contracts for services funded by annual appropriations may extend into the next fiscal year if the agency will order specified minimum quantities in the initial fiscal year. The contract also must incorporate FAR 52.232-19, Availability of Funds for the Next Fiscal Year. See FAR 32.703-2(b).
- B. APPORTIONMENT – THE SECOND LEVEL. 31 U.S.C. §§ 1512 – 1513, 1517(a)(1).
- 1. Requirement. 31 U.S.C. § 1512 requires apportionment of appropriations. 31 U.S.C. § 1513(b) requires the President to apportion Executive Branch appropriations. The President has delegated this authority to the Office of Management and Budget (OMB).
 - 2. Definition. An apportionment is a distribution by the OMB of amounts available in an appropriation into amounts available for specified time periods, activities, projects, or programs. OMB Cir. A-11, § 20.3. It is OMB's plan to spend resources provided by law. OMB Cir. A-11, § 120.1.

3. Purpose of Apportionment. The OMB apportions funds to prevent obligation at a rate that would create a need for a deficiency or supplemental appropriation. OMB Cir. A-11, § 120.2. As a general rule, an agency may not request an apportionment that will create a need for a deficiency or supplemental appropriation. See 31 U.S.C. § 1512.
 - a. Apportionment at a rate that would create a need for a deficiency or supplemental appropriation is permitted by 31 U.S.C. § 1515 for:
 - (1) Military and civilian pay increases;
 - (2) Laws enacted after budget submission which require additional expenditures; or
 - (3) Emergencies involving life or property.
 - b. An agency violates the apportionment statute if it must curtail its activity drastically to enable it to complete the fiscal year without exhausting its appropriation. To John D. Dingell, B-218800, 64 Comp. Gen. 728 (1985); To the Postmaster Gen., B-131361, 36 Comp. Gen. 699 (1957).
4. Prohibitions.
 - a. An officer or employee of the United States may not make or authorize an obligation or expenditure that exceeds an apportionment. 31 U.S.C. § 1517 (a)(1).
 - b. Technically, the statute does not prohibit obligating **in advance of** an apportionment. See Cessna Aircraft Co. v. Dalton, 126 F.3d 1442 (Fed. Cir. 1997). However, service regulations prohibit the practice. See e.g., AF Procedures for Administrative Control of Appropriations, § 2, para. B.1 (providing that activities may not incur obligations until appropriations are apportioned).

C. ADMINISTRATIVE SUBDIVISIONS – THE THIRD LEVEL. 31 U.S.C. § 1514.

1. Administrative Fiscal Controls. 31 U.S.C. § 1514 requires agency heads to establish administrative controls that: (1) restrict obligations or expenditures to the amount of apportionments; and (2) enable the agency to fix responsibility for exceeding an apportionment. These regulations include:
 - a. OMB Cir. A-11, § 150.7. This circular applies to all Executive agencies and requires OMB approval of fund control systems.
 - b. DOD Directive 7200.1; DOD FMR, vol. 14, app. A.
 - c. DFAS-IN 37-1, ch. 4; AF Procedures for Administrative Control of Appropriations § 5; DON FMPM, ch. 3.
2. Administrative Subdivision of Funds. OMB Cir. A-11, § 150.7; DOD FMR, vol. 14, app. A.
 - a. Allocations and Allotments. DFAS-IN 37-1, ch. 3, paras. 0312, 0314; Air Force Procedures for Administrative Control of Appropriations, § 5, para. B. These are formal administrative subdivisions prescribed generally by 31 U.S.C. § 1514. The Army transmits these funds on a computer generated form (DA Form 1323) called a Fund Authorization Document or FAD. The Air Force uses AF Form 401, Budget Authority/Allotment; AF Form 402, Obligation Authority/Suballotment; and AF Form 1449, Operating Budget Authority (for O&M funds).
 - b. Allowance/Target/Advisory Guide. DFAS-IN 37-1, ch. 3, para. 031402; Air Force Procedures for Administrative Control of Appropriations, § 6, para. B. These distributions do not create formal administrative subdivisions. The Army also uses DA Form 1323 to distribute an allowance, but the form is called a Fund Allowance System (FAS) document for this type of distribution.

3. Prohibition. An officer or employee may not make or authorize an obligation or expenditure that exceeds a formal administrative subdivision established by regulations. See 31 U.S.C. §1517(a)(2).

Discussion Problem: On 30 August, Fort Tiefert had \$170,000 remaining in its O&M allowance. On 2 September, the contracting officer awarded a contract for \$170,000 using these funds, but the Defense Accounting Office recorded this obligation as \$120,000. As a result, the Directorate of Resource Management believed erroneously that the Fort still had \$50,000 left in the O&M allowance. To avoid losing this money, the contracting officer awarded a contract on 20 September obligating \$50,000 in O&M. Is there an ADA violation?

IV. P-T-A VIOLATIONS AND THE ANTIDEFICIENCY ACT.

- A. Purpose. A violation of the Purpose Statute (31 U.S.C. § 1301(a)) may also lead to a violation of the Antideficiency Act (31 U.S.C. § 1341 or § 1517).
Department of Labor-Interagency Agreement Between Employment and Training Admin. and Bureau of Int'l Labor Affairs, B-245541, 71 Comp. Gen. 402 (1992); Funding for Army Repair Projects, B-272191, 97-2 CPD ¶ 141; To the Hon. Bill Alexander, B-213137, 63 Comp. Gen. 422 (1984). See also AF Procedures for Administrative Control of Appropriations, § 10, para. F.4. (providing that a reportable ADA violation may be avoidable if proper funds were available at the time of the original, valid obligation).
 1. ADA Analysis. Officials **may** be able to avoid an Antideficiency Act violation if:
 - a. Proper funds were available at the time of the erroneous obligation;
 - b. Proper funds were available continuously from the time of the erroneous obligation; and
 - c. Proper funds were available for the agency to correct the erroneous obligation.
- See To the Hon. Bill Alexander, B-213137, 63 Comp. Gen. 422 (1984); DOD FMR, vol. 14, ch. 2, para. C.5(b).

2. Common “Purpose” Issues - Operation and Maintenance (O&M) Funds.

- a. There is a limitation of \$750,000 on the use of O&M funds for construction. This is a “per project” limit. See 10 U.S.C. § 2805(c). Exceeding this threshold may be a reportable ADA violation. See The Honorable Bill Alexander, B-213137, 63 Comp. Gen. 422 (1984) (holding that where purpose violations are correctable, ADA violations are avoidable); DOD FMR, vol. 14, ch. 10, para. B.5.a (stating an ADA violation may occur if this limitation is exceeded); cf. AF Procedures for Administrative Control of Appropriations, § 6, para. C.6(a) (“Noncompliance with a statutory restriction on the use of an appropriation is a reportable violation”).
- b. DOD activities may use O&M funds for purchase of investment items costing not more than \$250,000. See National Defense Appropriations Act for FY 2005, Pub. L. No. 108-287, § 8040, 118 Stat. 979 (2004). Use of O&M in excess of this threshold is a “Purpose” violation and may trigger an Antideficiency Act violation. See DOD FMR, vol. 14, ch. 10, para. B.7.d.

B. Time (“Bona Fide Needs Rule”).

1. A violation of the Bona Fide Needs Rule (31 U.S.C. § 1502(a)) also may result in a violation of 31 U.S.C. § 1341 or 31 U.S.C. § 1517. See DFAS-IN 37-1, ch. 8, para. 0803; AF Procedures for Administrative Control of Appropriations, § 10, para. G.
2. To determine whether a Bona Fide Needs Rule violation is correctable, follow the same analytical process on page 6-7 used in determining whether a “Purpose” violation is correctable.

- C. Amount. As previously discussed (pages 6-2 through 6-7), making or authorizing obligations or expenditures in excess of funds available in an appropriation, apportionment, or formal administrative subdivision violates the Antideficiency Act. 31 U.S.C. §§ 1341 and 1517. To determine whether similar actions in excess of funds available in an informal subdivision result in an Antideficiency Act violation, follow the same analytical process on page 6-7 used in determining whether a “Purpose” violation violates the Antideficiency Act.

Discussion Problem: The Chief of Staff at Fort Tiefert has decided that the post needs a memento for presentation to all of the local officials, foreign dignitaries, and senior US Government personnel that routinely visit the Fort. Determined to make sure that the memento is as unique as Fort Tiefert, the Chief commissions a world-renowned military artist to create a painting that captures the spirit of Fort Tiefert and the highlights of its service to the nation. The artist charges \$50,000 for the painting, which will be hung in the main corridor of the headquarters building. The post also purchases 500 prints of the painting (the Chief wants to make sure they don’t run out) to use as mementos for presentation for the visitors. Each print costs \$200. Fort Tiefert uses O&M funds to cover the entire \$150,000 cost of this venture. Any fiscal problems here?

Discussion Problem: On 1 July 2005, the Fort Tiefert contracting officer awarded a \$690,000 contract for the construction of a storage facility. The contract was funded with FY 2005 O&M funds. Things went smoothly until 8 October 2005 when the contracting officer issued what she thought was an in-scope contract modification increasing the contract price by \$50,000. The contracting officer cited FY 2005 O&M funds on the modification. On 28 October, the Army Audit Agency (AAA) conducted a random audit of Fort Tiefert’s contracting process and determined that the 8 October modification was outside the scope of the original contract. Any fiscal issues here?

Discussion Problem: On 3 August 2005, the Fort Tiefert contracting officer awarded a contract for 100 off-the-shelf computers for a total of \$260,000 using FY 2005 O&M funds. The computers were to be used in a warehouse complex that would be completed (i.e., ready for installation of the computers) sometime in November 2005. Any fiscal issues here?

D. Additional Antideficiency Act Related Issues.

1. Indemnification Provisions. Generally, the GAO and courts have ruled that “open-ended” indemnification provisions in contracts violate 31 U.S.C. § 1341. See e.g., Union Pacific Railroad Corp. v. United States, 52 Fed. Cl. 730 (2002); United States Park Police Indemnification Agreement, B-242146, 1991 US Comp. Gen. LEXIS 1070, Aug. 16, 1991; Project Stormfury, B-198206, 59 Comp. Gen. 369 (1980). To Howard Metzenbaum, B-174839.2, 63 Comp. Gen. 145 (1984); Assumption by Gov’t of Contractor Liability to Third Persons, B-201072, 62 Comp. Gen. 361 (1983); Reimbursement of the State of New York Under Support Contract, B-202518, Jan. 8, 1982, 82-2 CPD ¶ 2; cf. E.I. DuPont De Nemours v. United States, 365 F.3d 1367 (2004) (holding that the Contract Settlement Act of 1944 exempted certain contracts with indemnification provisions from operation of the Antideficiency Act). There are statutory exceptions to this general rule:
 - a. Public Law 85-804 (codified at 50 U.S.C. §§ 1431- 1435 and implemented by E.O. 10,789 and FAR Subpart 50.4) allows the Secretary of Defense and Service Secretaries to approve the use of contract provisions which provide that the U.S. will indemnify a contractor against risks that are “unusually hazardous” or “nuclear” in nature.
 - b. 10 U.S.C. § 2354 authorizes indemnity provisions for unusually hazardous risks associated with research or development contracts.
 - c. 42 U.S.C. § 2210(j) permits the Nuclear Regulatory Commission and Department of Energy to initiate indemnification agreements that would otherwise violate the Antideficiency Act.
2. Judgments. A court or board of contract appeals may order a judgment in excess of an amount available in an appropriation or a subdivision of funds. Such judgment is not an Antideficiency Act violation. Bureau of Land Management, Reimbursement of Contract Disputes Act Payments, B-211229, 63 Comp. Gen. 308 (1984); Availability of Funds for Payment of Intervenor Attorney Fees, B-208637, 62 Comp. Gen. 692 (1983).

3. Augmentation. An Antideficiency Act violation may arise if an agency retains and spends funds received from outside sources, absent statutory authority. Unauthorized Use of Interest Earned on Appropriated Funds, B-283834, 2000 US Comp. Gen. LEXIS 163, Feb. 24, 2000 (unpub.).
4. Unauthorized Commitments. Because there is no legal obligation, there is no Antideficiency Act violation. Subsequent ratification could trigger an Antideficiency Act violation. See DFAS-IN 37-1, ch. 9, para. 090211; Air Force Procedures for Administrative Control of Appropriations, § 10, para. E; see also FAR 1.602-3(a).

Discussion Problem: SGT Jones, who has no authority to make purchases on behalf of the government, goes to the local parts store and charges a new diesel engine to the government. Is this a problem?

V. THE ANTIDEFICIENCY ACT'S LIMITATION ON VOLUNTARY SERVICES.
31 U.S.C. § 1342.

- A. Voluntary Services. An officer or employee may not accept voluntary services or employ personal services exceeding those authorized by law, except for emergencies involving the safety of human life or the protection of property. To Glenn English, B-223857, Feb. 27, 1987 (unpub.).
 1. Voluntary services are those services rendered without a prior contract for compensation, or without an advance agreement that the services will be gratuitous. Army's Authority to Accept Servs. from the Am. Assoc. of Retired Persons/Nat'l Retired Teachers Assoc., B-204326, 1982 US Comp. Gen. LEXIS 667, July 26, 1982.
 2. Acceptance of voluntary services does not create a legal obligation. Richard C. Hagan v. United States, 229 Ct. Cl. 423, 671 F.2d 1302 (1982); T. Head & Co., B-238112, 1990 US Comp. Gen. LEXIS 735, July 30, 1990; Nathaniel C. Elie, B-218705, 65 Comp. Gen. 21 (1985). Cf. T. Head & Co. v. Dep't of Educ., GSBICA No. 10828-ED, 93-1 BCA ¶ 25,241.

B. Examples of Voluntary Services Authorized by Law.

1. 5 U.S.C. § 593 (agency may accept voluntary services in support of alternative dispute resolution).
2. 5 U.S.C. § 3111 (student intern programs).
3. 10 U.S.C. § 1588 (military departments may accept voluntary services for medical care, museums, natural resources programs, or family support activities).
4. 10 U.S.C. § 2602 (President may accept assistance from Red Cross).
5. 10 U.S.C. § 10212 (SECDEF or Secretary of military department may accept services of reserve officers as consultants or in furtherance of enrollment, organization, or training of reserve components).
6. 33 U.S.C. § 569c (Corps of Engineers may accept voluntary services on civil works projects).

C. Application of the Emergency Exception. This exception is limited to situations where immediate danger exists. Voluntary Servs. -- Towing of Disabled Navy Airplane, A-341142, 10 Comp. Gen. 248 (1930) (exception not applied); Voluntary Servs. in Emergencies, 2 Comp. Gen. 799 (1923). This exception does not include “ongoing, regular functions of government the suspension of which would not imminently threaten the safety of human life or the protection of property.” 31 U.S.C. § 1342.

D. Gratuitous Services Distinguished.

1. It is not a violation of the Antideficiency Act to accept free services from a person who agrees, in writing, to waive entitlement to compensation. Army's Authority to Accept Servs. From the Am. Assoc. of Retired Persons/Nat'l Retired Teachers Assoc., B-204326, 1982 US Comp. Gen. LEXIS 667, July 26, 1982; To the Adm'r of Veterans' Affairs, B-44829, 24 Comp. Gen. 314 (1944); To the Chairman of the Fed. Trade Comm'n, A-23262, 7 Comp. Gen. 810 (1928).

2. An employee may not waive compensation if a statute establishes entitlement, unless another statute permits waiver. To Tom Tauke, B-206396, Nov. 15, 1988 (unpub.); The Agency for Int'l Dev. -- Waiver of Compensation Fixed by or Pursuant to Statute, B-190466, 57 Comp. Gen. 423 (1978) (AID employees could not waive salaries); In the Matter of Waiver of Compensation, Gen. Servs. Admin., B-181229, 54 Comp. Gen. 393 (1974); To the Director, Bureau of the Budget, B-69907, 27 Comp. Gen. 194 (1947) (expert or consultant salary waivable); To the President, United States Civil Serv. Comm'n, B-66664, 26 Comp. Gen. 956 (1947).

3. Acceptance of gratuitous services may be an improper augmentation of an appropriation if federal employees normally would perform the work, unless a statute authorizes gratuitous services. Compare Community Work Experience Program -- State Gen. Assistance Recipients at Fed. Work Sites, B-211079.2, 1987 US Comp. Gen. LEXIS 1815, Jan. 2, 1987 (augmentation would occur) with Senior Community Serv. Employment Program, B-222248, Mar. 13, 1987 (unpub.) (augmentation would not occur). Cf. Federal Communications Comm'n, B-210620, 63 Comp. Gen. 459 (1984) (noting that augmentation entails receipt of funds).

Discussion Problem: For the last year, Ft. Tiefert's MACOM (Major Command) has been pushing subordinate commands to implement the MACOM Voluntary Services Program (VSP). Authority for the VSP flows from 10 U.S.C. § 1588, which permits the Secretary of the Army to accept voluntary services for programs that support members of the armed forces and their families (such as family support, child development and youth services, and employment assistance for spouses). The VSP has worked so well at Ft. Tiefert that the CG there decided to expand the program. Under Ft. Tiefert's Improved VSP (IVSP), volunteers have painted offices, straightened out the post HQ's filing system, and refurbished a dilapidated old building completely (to include putting on a new roof) using materials donated by local merchants. Any ADA issues?

VI. VOLUNTARY CREDITOR RULE.

- A. Definition. A voluntary creditor is one who uses personal funds to pay what is perceived to be a government obligation.

- B. Reimbursement. Generally, an agency may not reimburse a voluntary creditor. Specific procedures and mechanisms exist to ensure that the government satisfies its valid obligations. Permitting a volunteer to intervene in this process interferes with the government's interest in ensuring its procedures are followed. Bank of Bethesda, B-215145, 64 Comp. Gen. 467 (1985).

C. Claims Recovery. U.S. International Trade Commission – Cultural Awareness, B-278805, 1999 US Comp. Gen. LEXIS 211, July 21, 1999 (noting that agencies, not the GAO, now must render decisions on such claims); Lieutenant Colonel Tommy B. Tompkins, B-236330, 1989 US Comp. Gen. LEXIS 1305, Aug. 14, 1989; Claim of Bradley G. Baxter, B-232686, 1988 US Comp. Gen. LEXIS 1511, Dec. 7, 1988; Irving M. Miller, B-210986, 1984 US Comp. Gen. LEXIS 1127, May 21, 1984; Grover L. Miller, B-206236, 62 Comp. Gen. 419 (1983); Reimbursement of Personal Expenditures by Military Member for Authorized Purchases, B-195002, May 27, 1980, 80-2 CPD ¶ 242. See Reimbursement of Selective Serv. Employee for Payment of Fine, B-239511, 70 Comp. Gen. 153 (1990) (returning request for decision to agency so it could determine who was responsible for paying fine). Cf. Use of Imprest Fund to Reimburse Employee for Small Purchase, B-242412, 1991 US Comp. Gen. LEXIS, July 22, 1991. See DFAS-IN 37-1, ch. 9, para. 092037. Claims are recoverable if:

1. The underlying expenditure is authorized;
2. The claimant shows a public necessity;
3. The agency could have ratified the transaction if the voluntary creditor had not made the payment.

VII. PASSENGER CARRIER USE. 31 U.S.C. § 1344.

A. Prohibition. An agency may expend funds for the maintenance, operation, and repair of passenger carriers only to the extent that the use of passenger carriers is for official purposes. Federal Energy Regulatory Comm’n’s Use of Gov’t Motor Vehicles and Printing Plant Facilities for Partnership in Educ. Program, B-243862, 71 Comp. Gen. 469 (1992); Use of Gov’t Vehicles for Transp. Between Home and Work, B-210555, 62 Comp. Gen. 438 (1983). Violations of this statute are not ADA violations, but significant sanctions do exist. See Felton v. Equal Employment Opportunity Comm’n, 820 F.2d 391 (Fed. Cir. 1987); Campbell v. Department of Health and Human Servs., 40 M.S.P.R. 525 (1989); Gotshall v. Department of Air Force, 37 M.S.P.R. 27 (1988); Lynch v. Department of Justice, 32 M.S.P.R. 33 (1986).

B. Exceptions.

1. Generally, the statute prohibits domicile-to-duty transportation of appropriated and nonappropriated fund personnel.
 - a. The agency head may determine that domicile-to-duty transportation is necessary in light of a clear and present danger, emergency condition, or compelling operational necessity. 31 U.S.C. § 1344(b)(8).
 - b. The statute authorizes domicile-to-duty transportation if it is necessary for fieldwork, or is essential to safe and efficient performance of intelligence, law enforcement, or protective service duties. 31 U.S.C. § 1344(a)(2).
2. Overseas, military personnel, federal civilian employees, and family members may use government transportation when public transportation is unsafe or unavailable. 10 U.S.C. § 2637.
3. This statute does not apply to the use of government vehicles (leased or owned) when employees are in a temporary duty status. See Home-to-Airport Transp., B-210555.44, 70 Comp. Gen. 196 (1991) (use of government vehicle for transportation between home and common carrier authorized in conjunction with official travel); Home-to-Work Transp. for Ambassador Donald Rumsfeld, B-210555.5, 1983 US Comp. Gen. LEXIS 115, Dec. 8, 1983.

C. Penalties.

1. **Administrative Sanctions.** Commanders shall suspend without pay for at least one month any officer or employee who willfully uses or authorizes the use of a government passenger carrier for unofficial purposes or otherwise violates 31 U.S.C. § 1344. Commanders also may remove violators from their jobs summarily. 31 U.S.C. § 1349(b).

2. Criminal Penalties. Title 31 does not prescribe criminal penalties for unauthorized passenger carrier use. But see UCMJ art. 121 [10 U.S.C. § 921] (misappropriation of government vehicle; maximum sentence is a dishonorable discharge, total forfeiture of pay and allowances, and 2 years confinement); 18 U.S.C. § 641 (conversion of public property; maximum punishment is 10 years confinement and a \$10,000 fine).

VIII. SANCTIONS FOR ANTIDEFICIENCY ACT VIOLATIONS.

A. Adverse Personnel Actions. 31 U.S.C. §§ 1349(a), 1518.

1. Officers or employees who authorize or make prohibited obligations or expenditures are subject to administrative discipline, including suspension without pay and removal from office. DOD FMR, vol. 14, ch. 9, para. 0901.
2. Good faith or mistake of fact does not relieve an individual from responsibility for a violation. Factors such as “a heavy workload at year end” or an employee’s “past exemplary record” generally are relevant only to determine the appropriate level of discipline, not to determine whether the commander should impose discipline. See DOD FMR, vol. 14, ch. 9, para. 0902.

B. Criminal Penalties. 31 U.S.C. §§ 1350, 1519. A knowing and willful violation of the Antideficiency Act is a Class E felony. Punishment may include a \$5,000 fine, confinement for up to two years, or both. See also DOD FMR, vol. 14, ch. 9, para. 903.

IX. REPORTING AND INVESTIGATING VIOLATIONS. 31 U.S.C. §§ 1351, 1517; OMB Cir. A-11, § 145.2; DOD FMR, vol. 14, chs. 3-7; DFAS-IN 37-1, ch. 4, para. 040204; AFI 65-608, chs. 3, 4; DON FMPM, pt. E. See also U.S. DEP’T OF ARMY, ANTIDEFICIENCY ACT (ADA) INVESTIGATION MANUAL (Jan. 1998) available at <http://www.asafm.army.mil/fo/fod/ada/ada.asp#manual>.

A. Reporting Suspected Violations. An individual learning of or detecting a potential ADA violation must report within 10 working days the possible violation to their chain of command. DOD FMR, vol. 14, ch. 3, para. 030101.

1. Army –the Army shall inform the Director of Resource Management (DRM) at the service activity of any potential violations and the DRM shall immediately notify the commander of the allowance/allotment involved. DOD FMR, vol. 14, ch. 3, para. 030102.
 - a. The commander must prepare a “flash report” and send it through the chain of command (MACOM) to the ASA (FM&C) within 15 business days of the discovery. DFAS-IN 37-1, ch. 4, para. 040204.B.1.
 - b. The commander will appoint an investigating officer, legal representative, and subject matter expert to the investigating team. DFAS-IN 37-1, ch. 4, para. 040204.B.2.
2. Navy/Marines – Department of Navy commands and activities report potential ADA violations through the chain of command to the Assistant Secretary of the Navy (Financial Management and Comptroller). DOD FMR, vol. 14, ch. 3, para. 030103.
3. Air Force – the Air Force reports potential violations to the Financial Management organization of the Major Command (MAJCOM), Field Operating Activity (FOA), or Direct Reporting Unit (DRU). AFI 65-608, para. 3.3.

B. Investigations.

1. The first step is a preliminary review to gather basic facts and determine whether an Antideficiency Act violation has apparently occurred. DOD FMR, vol. 14, ch. 3, para. 302. Completion of the review is usually required within 90 days. DOD FMR, vol. 14, ch. 3, para. 030201. For Army activities, the preliminary review must be completed within 90 days after discovery of the potential violation. DFAS-IN 37-1, ch. 4, para. 040204. For the Air Force, the review must be completed and reported to SAF/FMFP no later than 90 days from the review start date. AFI 65-608, para. 3.3.

2. If the preliminary review determines that a violation occurred, a formal investigation must be initiated within 15 business days of the approval of the preliminary review report. DOD FMR, vol. 14, ch. 3, para. 030204. The purpose of the formal investigation is to determine the relevant facts and circumstances of the potential violation – if a violation has occurred, what caused the violation what are appropriate corrective actions and lessons learned, and who was responsible. DOD FMR, vol. 14, ch. 4, para. 0401. Typically, the MACOM/MAJCOM commander approves/appoints the IO, who must be adequately trained and qualified to serve as an IO or as an investigative team member. DOD FMR, vol. 14, ch. 4, para. 040401; DFAS-IN 37-1, ch. 4, para. 040204; AFI 65-608, para. 4.3. A final report on the violation must reach the Office of the Under Secretary of Defense (Comptroller) within 9 months after the formal investigation began. DOD FMR, vol. 14, ch. 6, paras. 050201 and 603. Status reports on the investigation are due monthly to the OUSD (Comptroller) office. DOD FMR, vol. 14, ch. 6, para. 603.
3. If the IO believes criminal issues may be involved, the investigation should be stopped immediately and the IO should consult with legal counsel to determine whether the matter should be referred to the appropriate criminal investigators for resolution. DOD FMR, vol. 14, ch. 5, para. 050301(E).

C. Establishing Responsibility.

1. Responsibility for a violation is fixed at the moment the improper activity occurs, e.g., overobligation, overexpenditure, etc.
2. A responsible party is the person who has authorized or created the overdistribution, obligation, commitment, or expenditure in question. Reports may name commanders, budget officers, or finance officers because of their positions if they failed to exercise their responsibilities properly. “However, the investigation shall attempt to discover the specific act -- or failure to take an action -- that caused the violation and who was responsible for that act or failure to take an action.” DOD FMR, vol. 14, ch. 5, para. 050301.

3. Generally, the responsible party will be the highest ranking official in the decision making process who had actual or constructive knowledge of precisely what actions were taken and the impropriety or questionable nature of such actions. See To Dennis P. McAuliffe, B-222048, 1987 US Comp. Gen. LEXIS 1631, Feb. 10, 1987.
4. Prior to taking disciplinary action, the Department/Agency must submit a preliminary summary report of violation, with legal counsel coordination, to the OSD (Comptroller) and to DFAS. The OSD (Comptroller) will forward the report to the OSD Deputy General Counsel (Fiscal) for a final determination concerning the occurrence of the ADA violation. Following that review, the report will be returned for final Department/Agency action. Memorandum, Under Secretary of Defense (Comptroller), to Department and Agency Comptrollers; subject: Processing of Antideficiency Act (ADA) Violation Cases (19 November 2003).

D. Reports to the President and Congress.

1. The Secretary of Defense must report violations to the President and Congress. OMB Cir. A-11, para. 145.7; DOD FMR, vol. 14, Ch. 7, para. E. As of 8 December 2004, the report must also be transmitted to the Comptroller General. See Transmission of Antideficiency Act Reports to the Comptroller General of the United States, B-304335, Mar. 8, 2005 (citing 31 U.S.C. §§ 1351, 1517(b), as amended by Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, div. G, title II, § 1401, 118 Stat. 2809, 3192 (2004)).
2. Contents of the report.
 - a. Administrative information;
 - b. Nature of the violation;
 - c. Identification of the responsible individual;
 - d. Cause and circumstances of the violation;

- e. Administrative discipline imposed;
- f. Actions taken to correct the violation; and
- g. Statement of the responsible individual.

X. CONTRACTOR RECOVERY WHEN THE ADA IS VIOLATED.

A. Recovery Under the Contract.

- 1. A contract may be null and void if the contractor knew, or should have known, of a specific spending prohibition. Hooe v. United States, 218 U.S. 322 (1910) (contract funded with specific appropriation). Cf. American Tel. and Tel. Co. v. United States, 177 F.3d 1368 (Fed. Cir. 1999).
- 2. Where contractors have not been responsible for exceeding a statutory funding limitation, the courts have declined to penalize them. See, e.g., Ross Constr. v. United States, 392 F.2d 984 (1968); Anthony P. Miller, Inc. v. United States, 348 F.2d 475 (1965).
- 3. The exercise of an option may be inoperative if the government violates a funding limitation. The contractor may be entitled to an equitable adjustment for performing under the “invalid” option. See Holly Corp., ASBCA No. 24975, 83-1 BCA ¶ 16,327.

B. Quasi-Contractual Recovery. Even if a contract is unenforceable or void, a contractor may be entitled to compensation under the equitable theories of quantum meruit (for services) or quantum valebant (for goods). 31 U.S.C. § 3702; Prestex Inc. v. United States, 320 F.2d 367 (Ct. Cl. 1963); Claim of Manchester Airport Auth. for Reimbursement of Oil Spill Clean-up Expenses, B-221604, Mar. 16, 1987, 87-1 CPD ¶ 287; Department of Labor--Request for Advance Decision, B-211213, 62 Comp. Gen. 337 (1983).

C. Referral of Claims to Congress. The GAO may refer non-payable claims to Congress. 31 U.S.C. § 3702(d); Campanella Constr. Co., B-194135, Nov. 19, 1979, 79-2 CPD ¶ 361.

Final Discussion Problem: For years, the Army owned an administrative office building adjacent to Fort Mojave. Several months ago, the MACOM Facilities Inspection Team directed the Commander of Fort Mojave to make several upgrades to the building. Fort Mojave's Engineer obtained funds for the project and forwarded a purchase request to the contracting officer. This document certified that \$70,000 O&M was available for the project. Two months later, the contracting officer awarded an \$82,000 contract to Constructors, Limited. To date, the contractor has received \$40,000 in progress payments. Yesterday, the Engineer learned that the Corps of Engineers had conveyed the building to the State one month before the award of the renovation contract. Any fiscal problems here?

XI. CONCLUSION.